IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 302 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA sd/-
and
HON'BLE MR.JUSTICE J.R.VORA sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BACHUBHAI BHULABHAI HALPATI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 302 of 1997

MR KR RAVAL for Petitioner No. 1

MR PRACHCHHAK, APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 26/04/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. The Appellant - accused Bachubhai Bhulabhai Halpati has filed this Appeal, through Jail, and

challenged the impugned Judgment and order of conviction and sentence dated 16.10.1996, passed by the learned Addl. Sessions Judge, Valsad at Navsari, in Sessions Case No.30 of 1995, convicting the appellant - accused for the major offence of murder u/s.302 I.P.Code and sentenced him to suffer life imprisonment and to pay fine of Rs.1000/- i/d to further undergo Six months' S.I.

2. The jail record of the appellant - accused, produced by learned APP Shri Prachchhak, shows that he has remained as under-trial prisoner for a period of 1 year - 9 months and 2 days and after his order of conviction and sentence dated 16.10.1996 he has remained in jail for a period of 7 years, 5 months and 20 days, as on 6.4.2004, meaning thereby till today he has remained in jail, in all, for the period of about 10 years. He has also earned remission of 2 years. During this period, this unfortunate appellant - accused was neither released on furlough, parole or on temporary bail. His jail conduct is reported to be good. He is suffering from some ailment and for his treatment he has been transferred to District Jail, Jamnagar, on 13.2.2004.

3. It is the prosecution case that on 14.12.1995 at about 6.00 pm when deceased Dhanjibhai Janabhai was looking after the agricultural farm of complainant Ajaykumar Thakorbhai Desai at Kunta, Vachla Faliya, at that time the accused came there. Thereupon, the deceased told him that he was stealing the Sugarcane from their field and causing loss to them and because of that their master giving them scolding, therefore, he should not take away sugarcane from there. Thereupon, all of a sudden the accused gave push to the deceased Dhanjibhai and thereafter assaulted him with "hoe" on the head and after throwing away "hoe" there he ran away. The blood came out because of the injury and deceased succumbed to that injury.

Bhartiben, P.W.3, Ex.12, had witnessed the incident. She came running to the field where Shanker and Dhanji Arjun were there and she informed about the incident. Thereupon, Dhanji Arjun, P.W.4, informed about the same to the complainant Ajaykumar Thakorbhai Desai. Ajaykumar lodged the F.I.R. about the incident at 8.00 p.m. at Vapi Town Police Station which was registered as I-CR No.158/95 for the offence u/s.302 I.P.Code. After completing the investigation the Police filed charge-sheet against the accused for the offence u/s.302 I.P.Code. Ultimately the accused was tried before the Court of Addl. Sessions Judge, Valsad at Navsari.

4. Learned Addl. Sessions Judge, after considering the evidence of the prosecution witnesses and the defence of the accused, came to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt, therefore, he convicted the appellant-accused for the offence u/s.302 I.P.Code and sentenced him, as stated earlier. This order of conviction and sentence dated 16.10.1996 is challenged in this Appeal.

5. As stated earlier the appellant-accused has filed this Appeal, through Jail, as he is absolutely poor person and not able to engage any private Advocate. Therefore, on his request the office had appointed Shri K.R.Raval to defend his case in this Appeal. Unfortunately, when the matter was called out before the recess he was not available. Neither there is sick note nor any leave note of Shri Raval. As stated earlier the accused is in jail for more than 10 years, therefore, in absence of the learned Advocate for the Appellant we have heard learned APP Shri Prachchhak and after carefully going through the entire evidence on record and the Judgment of the learned trial Judge, we are of the opinion that the order of conviction and sentence recorded by the learned trial Judge was not sustainable on the following grounds.

6. The entire prosecution case rests on the sole testimony of eye witness Bhartiben, wife of Shankerbhai, P.W. 3, Ex.12. She has stated in her evidence that she stays with her husband Shankerbhai in the field of complainant Ajaykumar at Kunta, Vachla Falia. On the day of incident Dhanjibhai Jana, Dhanji (deceased), Dhanji Arjun, etc. were working there and they were also there. About two years back the incident in question took place at about 5.45 or 6.00 p.m. At that time when she was returning home from the flour-mill and passing through Sugarcane field of Ajaykumar, the complainant, the accused and deceased Dhanji were quarrelling and shouting. The accused hit "hoe" on the head of Dhanjibhai. He gave three blows. Thereupon she got frightened and came quickly towards the gate. At that time her husband Shanker and Dhanji Arjun were sitting there. She told them about the incident. Thereafter, she had come along with them at the place of incident. Dhanji Jana was lying there and the accused Bachubhai had ran away leaving behind him "hoe" which was lying near deceased Dhanjibhai. It appears to us that the motive of the case did not come in the evidence of Bhartibhai. Therefore, at this juncture the Public Prosecutor may have asked the witness about the motive. Therefore,

witness Bhartiben stated that Bachubhai had gone to commit theft, thereupon deceased Dhanji asked him that why he was committing theft, and because of that their master scold them. Thereupon, the accused assaulted the deceased. When she had gone along with her husband near Dhanji, she found him dead. He had received injury on the right side of his head. Thereafter, her husband Shanker and Dhanji Arjun had gone to their master for informing about the incident. She had identified Muddamal weapon "hoe" and also the accused sitting in the Court, who was known to her much prior to the incident.

In her cross-examination she had stated that the distance between her house and flour-mill was hardly 15 minutes. She left for flour-mill at 4.00 pm. She had seen accused Bachubhai and deceased Dhanji quarreling at a distance of 150 ft. She had also heard them. Dhanji was telling the accused "you commit theft of sugarcane and my master scold me." On hearing this, altercation took place and Bachu (accused) started beating. In the night of that incident the Police recorded her statement, but she was not sure about the exact time. She has stated in her cross-examination that at the time of incident sugarcane was of 6 ft. height in the field. The incident took place in the rear side of the field. She had stated that it was not true that because of the height of sugarcane the incident could not be witnessed, however, she was nearby, therefore, she had seen it. She can say that Muddamal weapon "hoe" was the same which was used in the commission of offence, but she has not definite sign about it. She had denied that after talking to her husband about the quarrel she had gone with the flour at her house. However, she stated that she had gone thereafter along with her husband.

7. Shankerbhai, the husband of Bhartiben, P.W.2, Ex.11, had initially stated in his evidence in chief before the Court that the incident in question took place at about 5.45 to 6.00 pm in the field of Ajaybhai. At that time he was standing on the gate of the field and talking with Dhanji Arjun. At that time his wife Bharti came there and told them that Dhanji Jana (deceased) and Bachu (accused) were fighting. Thereupon, all three of them had gone to see. They saw Dhanji Jana lying there. When they had gone, beating was not continued. At that time the accused Bachu came near there Gate. They had seen wounds on the head of deceased Dhanji. The blood was coming out. Thereafter, he and Dhanji had informed their Master Ajaybhai, who lodged the complaint. At this stage, the Public Prosecutor asked for permission to declare this witness hostile and accordingly he was treated as

hostile.

Surprisingly, in his cross examination by the Public Prosecutor, he admitted the statement made before the Police wherein he had stated that .."I and Dhanji Arjun ran to the place where Dhanji and Bachu were quarrelling and Dhanji was telling Bachubhai that why he was committing theft of sugarcane ? Our Master is scolding us. Thereupon, Bachu, all of a sudden got excited and pushed Dhanji down and gave blow with "hoe" and tried to give blow with "hoe" on the head. At that time they raised shouts and because of that he gave blow with "hoe". Thereafter, immediately he gave another blow and till they reached near Dhanji, the accused gave third blows, one after the other, and after throwing away the "hoe" there he ran away. He has also admitted that when they had gone there Dhanji was having "hoe" with pull of blood, which he has identified as Muddamal weapon.

In his cross examination he has stated that the Police recorded his statement at about 6.00 pm. In a question put to him by the Court, he stated that the distance between the Gate, where they were standing and Dhanji was lying, were hardly of two minutes. In his further cross-examination by the accused he stated that after his wife told him that Bachu and Dhanji were quarrelling, thereafter when they were going there Bachu met them. After Bachu left they reached where Dhanji was lying.

8. From the above it is clear that no reliance can be placed on the testimony of this witness Shanker, who initially did not support the prosecution case and when he was declared hostile he tried to support the prosecution, but once again in the cross-examination of the accused he has tried to support the accused. FIR was lodged by Ajaykumar, P.W.1, Ex.9, at Vapi Town Police station at 8.00 pm. He has admitted in his cross-examination that the distance from the place of incident to his house is 10 to 12 minutes, which is about 4 to 5 k.mtrs. and it will take half an hour for raeching the place of incident from his house by walking. Therefore, it will take some time for the police to reach the place of incident. In spite of that this witness had deposed that the police recorded his statement at 6.00 pm. As per the question put by the Court he stated that the distance between the Gate, where they were standing and the place of incident, was hardly 2 minutes. On the contrary, in his cross-examination, this witness has stated that they had gone to the place of incident only after he was told by his wife Bharti that Bachu (accused)

and Dhanji (deceased) were quarrelling and thereafter when they were going to the place of incident at that time they met Bachu (accused). After Bachu left they reached to the place where deceased Dhanji lying. The evidence of such witness cannot be relied upon.

9. Similarly the evidence of sole eye witness Bharti is also not reliable. She claimed to have witnessed the incident while returning from flour mill. The incident took place at about 5.45 pm to 6.00 pm. She had left her house at 4.00 pm for flour mill. The distance from her house to flour mill was hardly 15 minutes. If that is so then she would have come back, at least, within 40 to 45 minutes and it will not take 2 hours time. As stated earlier the motive was not attributed by her in her evidence, therefore, when the Public Prosecutor asked about motive she stated that because accused Bachu had gone to commit theft of sugarcane the deceased Dhanji told him that why he was committing theft in the field and because of that their master scold them.

In her cross examination she had stated that she had seen both, the accused Bachu and deceased Dhanji from the distance of 150 ft. and also heard the talk between them. This does not inspire any confidence because the height of sugarcane crop was about 6 ft. at the time of incident and, therefore, obviously it would not be possible for her to see the accused and deceased quarreling with each other and accused giving blow of "hoe" on the head of deceased, because the incident in question took place in rear side of the field. It is clear from her cross examination that because of the height of sugarcane it was not possible for her to witness the incident, but she claimed to have witnessed the incident by saying that she was near and, therefore, she had seen the incident. Except identifying Muddamal "hoe" she was not able to give any definite signs about it. In our considered opinion she was a chance witness and no reliance can be placed on her sole testimony.

10. From the evidence of her husband Shanker it is clear that this witness Bhartiben had never told them that the accused Bachu had assaulted deceased with "hoe" on his head. As per the evidence of Shankerbhai, Bhartiben had simply told that both, the accused and the deceased, were quarrelling. Thereupon when they had gone to the place of incident they found Bachu on the way and when they reached the place of incident they found that Dhanji was lying on the ground. They completely falsified the evidence of Bhartiben who is claimed to have witnessed the incident. Once the evidence of this witness

Bhartiben is discarded then there is no evidence to connect the appellant - accused with crime.

11. Dhanjibhai Arjunbhai, P.W.4, Ex.13, is another witness, who also reached the place of incident immediately after the occurrence. He stated something else in his evidence before the Court. According to him, Bhartiben, wife of Shanker came to the gate where they were sitting and told that why they were sitting, Bachu has killed Dhanji. This was not deposed by witness Shanker and Bhartiben in their deposition. According to him, he and Shanker had gone to the place where Dhanji was lying and and Bhartiben had gone to her house, whereas Bhartiben claimed that she had gone to the place of incident along with her husband Shanker and Dhanji. He was also declared hostile by the prosecution. Thereafter, like Shanker he has also admitted in his cross-examination by the prosecution, that he has stated before the police that when he and Shanker reached the place of incident Dhanji and Bachu were quarrelling and Dhanji told Bachu that why he committing theft of sugarcane in the field and because of that their master scold them. Thereupon accused Bachu got excited and gave the blows of "hoe" on his head. Immediately after the incident the Police recorded his statement at 6.00 pm, whereas FIR was lodged at about 5.00 pm by complainant Ajaykumar. He has denied in his cross examination that Bhartiben came there frightened and told them that Bachu killed Dhanji. It is proved in the evidence of Investigating Officer that he had not stated in his statement before the Police that along with Shanker he had gone to the place of incident.

12. As stated earlier the complainant Ajay Thakorbhai Desai had derrived the knowledge of incident from Shankerbhai. Neither Shanker had witnessed the actual incident nor the complainant Ajaykumar. Therefore, his evidence is also of no use to the prosecution.

13. Under the circumstances, we are of the considered opinion that the learned Judge has committed grave error in convicting the appellant - accused for the offence u/s.302 I.P.Code for committing murder of deceased Dhanji. The learned Judge, in our considered opinion, was absolutely wrong in placing reliance on the evidence of witness Bhartiben, Shankerbhai and Dhanji. Their evidence is not at all reliable.

14. In view of the above, this Appeal is allowed. The impugned Judgment and order of conviction dated 16.10.1996 passed by the learned Addl. Sessions Judge,

Valsad at Navsari, in Sessions Case No.30 of 1995, convicting the appellant - accused Bachubhai Bhulabhai Halpati for the offence u/s.302 I.P.Code and sentenced him to suffer Life Imprisonment and to pay fine of Rs.1000/- i/d to further under-go 6 months' SI is hereby quashed and set aside. Fine, if paid, be refunded to the appellant - accused forthwith. If the appellant accused is not required in any other case then he may be set at liberty, forthwith.

(B.J.Shethna, J.)

Date : April 26, 2004

(J. R. Vora, J.)

sas